

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DONALD R. EARL,

Petitioner,

v.

U.S. FOOD AND DRUG
ADMINISTRATION,

Respondent.

CASE NO. C07-05413BHS

ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS FOR LACK OF
SUBJECT MATTER
JURISDICTION, DENYING
RESPONDENT'S MOTION TO
DISMISS FOR FAILURE TO
STATE A CLAIM AS MOOT,
AND DENYING PETITIONER'S
MOTION FOR SUMMARY
JUDGMENT AS MOOT

This matter comes before the Court on Petitioner's Motion for Summary Judgment (Dkt. 6) and Respondent's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Dkt. 12). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file herein. When considering the instant motions, the Court must first determine whether it has subject matter jurisdiction over the action before the Court can reach other matters. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-101 (1998). For the reasons stated below, this Court does not have subject matter jurisdiction over this matter and therefore, the case must be dismissed and all other motions must be dismissed as moot.

While Petitioner contends that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1361, the action shall be construed as being brought under the APA. 5 U.S.C. § 702

1 provides: “A person suffering legal wrong because of agency action, or adversely affected by
2 agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5
3 U.S.C. § 704 provides further: “Agency action made reviewable by statute *and final agency*
4 *action* for which there is no adequate remedy in a court are subject to judicial review.”
5 (Emphasis added). A party seeking judicial review of an administrative action must first show
6 that they have exhausted all administrative remedies. *McKart v. U.S.*, 395 U.S. 185, 193 (1969).

7 A primary purpose [of the exhaustion doctrine] is, of course, the avoidance of
8 premature interruption of the administrative process. The agency, like a trial
9 court, is created for the purpose of applying a statute in the first instance.
10 Accordingly, it is normally desirable to let the agency develop the necessary
11 factual background upon which decisions should be based. And since agency
12 decisions are frequently of a discretionary nature or frequently require expertise,
13 the agency should be given the first chance to exercise that discretion or to apply
14 that expertise. And of course it is generally more efficient for the administrative
15 process to go forward without interruption than it is to permit the parties to seek
16 aid from the courts at various intermediate stages.

17 *McKart*, 395 U.S. at 193-194.

18 While the Court recognizes and understands Petitioner’s heart-felt and eloquent
19 arguments, the above-mentioned procedures are integral to maintaining efficiency within the
20 judicial system and do not stand as a road block to upholding “the high principals [sic] in our
21 Constitution [that] are taught to the people of this nation as children.” Dkt. 14 at 5. Petitioner
22 has not attempted to submit his claims to the FDA through a citizen petition.

23 A complaining party may be successful in vindicating his rights in the
24 administrative process. If he is required to pursue his administrative remedies, the
25 courts may never have to intervene. And notions of administrative autonomy
26 require that the agency be given a chance to discover and correct its own errors.
27 Finally, it is possible that frequent and deliberate flouting of administrative
28 processes could weaken the effectiveness of an agency by encouraging people to
ignore its procedures.

Id. at 195. Because Petitioner has not allowed the FDA the opportunity to address his
claims and no final agency action has been taken, these claims are not ripe for judicial
review.

1 Therefore, it is hereby

2 **ORDERED** that Respondent's Motion to Dismiss pursuant to Fed. R. Civ. P.
3 12(b)(1) (Dkt. 12) is **GRANTED**. The Petition for Writ of Mandamus is hereby
4 **DISMISSED without prejudice**. Petitioner's Motion for Summary Judgment (Dkt. 6)
5 and Respondent's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Dkt. 12) are
6 hereby **DENIED as moot**.

7 DATED this 16th day of November, 2007.

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11 BENJAMIN H. SETTLE
United States District Judge
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